No. 15809

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE PALERMO, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal from the District Court of the United States for the Eastern District of Washington

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BRIEF FOR THE APPELLEE

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STATEMENT OF JURISDICTION

The statement of jurisdiction as set forth in appellant's brief with reference to the statutes therein indicated is accepted as accurate.

ADDITIONAL STATEMENT OF FACTS

Appellee generally accepts the statement of facts as set forth by the appellant except to add the following:

On Page 3 of appellant's brief it is stated that appellee made no attempt to attack the deductible business expenses taken by appellant on his returns for the indictment years although there were mistakes in the returns as to such expenses. If any deductions were left out, they were inconsequential as the appellant admitted the amount of tax due as alleged by the appellee was correct and this was admitted without objection. (Pl. Ex. 93-96; R. 319-321, 323).

The appellee not only alleged the under-statement of income for all of the indictment years but showed exactly the under-statement by producing the evidence in the form of checks, statements, ledgers, or other financial records, and testimony of witnesses.

To substantiate appellee's position, a net worth statement, was admitted without objection. (Pl. Ex. 66; R. 185, 188).

Appellant showed a definite and deliberate pattern or scheme by withholding each year a number of checks that were solely within his knowledge and under his care, custody and control. (R. 393-395, 397-398).

During the four indictment years appellant received two hundred thirty-five (235) checks from the sale of logs or other services. Ninety-nine (99) of those checks were not recorded on the books and records of appellant. 42.1 percent of the checks received during the indictment years were not recorded on the books. (R. 290). In addition to the indictment years, appellant in 1948 received twenty-seven (27) checks of which twenty (20) checks were not reported. (Pl. Ex. 91; R. 293-298). In 1949 appellant received forty-two (42) checks of which twenty-four (24) were not reported. (Pl. Ex. 92; R. 300-302). Exhibits (Pl. Ex. 91 and 92) were admitted by the Court with proper instructions as to how they were to be considered by the jury. (R. 245, 295, 559).

In 1955 appellant withheld from his accountant in connection with his 1954 income tax return, approximately $4,960.67 in gross receipts, which apparently were the receipts from about twenty (20) checks. (R. 439).

Although the chief claim of appellant is that he negligently under-reported his income and negligently underpaid income tax on it, (Br. 3) in our opinion his statement of facts does not adequately set forth the evidence in the record, which plainly showed he "knowingly and wilfully" perpetrated income tax evasion. Since the argument which will follow later

in the brief discusses this evidence fully, it will not be repeated at this point.

ANSWER TO APPELLANT'S SPECIFICATION OF ERROR

(a) *In reference to alleged Error No. 1.* There was no basis for the Court to grant appellant's Motion for Judgment of Acquittal.

The Trial Court in denying this motion very clearly set forth his, as well as our reason on Page 365 of the Record.

> "The circumstances here are that large amounts were involved and that in quite a number of instances receipts were not deposited in the bank or deposited in the bank and not recorded, and that would be sufficient to take the case to the jury."

At Page 366 of the Record the Court further states:

> "Coupled with consistent failure to put on his books large amounts which he has received from logging companies. In some instances the whole amount that he has received from certain buyers is not put on his books at all. That is exactly what the man does if he wants not to show his income. He can show his books and the statement is correct. It seems to me that this statement without any confession is sufficient to take the case to the jury. It is for the jury to determine the force and effect of it and what inference to draw in the light of the explanations."

(b) *In reference to alleged Error No. 2.* In reference to the "Not Guilty" instruction.

It is the duty of the Court to submit the case to the jury when there is sufficient evidence to show a prima facie case and this is covered in the answer to alleged Error No. 1 above.

(c) *In reference to alleged Error No. 3.* There is no basis for a new trial.

Appellee produced proper and sufficient evidence at the trial to sustain the verdict of the jury. The Court did not err in its instructions and there was no error in the admission of documentary evidence. The case was properly submitted to the jury and the jury rendered a proper verdict.

(d) *In reference to alleged Error No. 4 through No. 11.* These specifications of error all deal with proposed instructions of the appellant.

All of the proposed instructions were substantially covered by the Court in its instructions. The Trial Court's instructions were not quite so voluminous but they did cover each and every element requested by the appellant except that he gave them in a clear and concise manner setting forth the instructions in such a manner that they could be understood by the jury. *Holland v. United States,* 348 U. S. 121.

In reference to proposed instruction 16, appellee feels that the Judge answered this specification of error at the time of trial. (R. 570).

(e) *In reference to alleged Error No. 12 through No. 15.* The objection as to the admissibility of plaintiff's exhibits 77 and 78 by appellant because of insufficient identification is not well taken.

The record shows that Lyle Lumber Company was sold to Everett Thoren and the assets of the Lyle Lumber Company became part of the Thoren Lumber Company. (R. 213). Everett Thoren received the books and records of the Lyle Lumber Company and he had them in his possession. (R. 213). The records were identified by Thoren and shown to be connected with the appellant in this case. (R. 214-216; Pl. Ex. 77-78). Simonsen, the Internal Revenue Agent, testified that he had personally checked the items in the exhibits in making up his summaries (Pl. Ex. 91-92) and that he cross-checked the items in plaintiff's exhibits 77 and 78 with the bank deposit slips of appellant and that they matched. (R. 292-297). This sufficiently identified plaintiff's exhibits 77 and 78 with the appellant and this case to make them admissible in evidence, and once admitted they could be used in the summaries admitted in evidence. Appellee submits that the summaries were proper and were compiled from the evidence properly admitted in this trial (R. 214-216, 292-297) and that the Trial Judge gave the proper instructions as to their use by the jury. (R. 563-564). *United States v. Johnson,* 319 U. S. 503; *Costello v. United States,* 350 U. S. 359.

ARGUMENT

THE EVIDENCE CLEARLY ESTABLISHED THAT APPELLANT KNOWINGLY AND WILFULLY PERPETRATED INCOME TAX EVASION AS ALLEGED IN THE INDICTMENT.

The principal issue in this appeal is whether there was substantial evidence from which the jury could find that appellant "knowingly and wilfully" perpetrated income tax evasion. To reach his conclusion appellant reweighs the evidence of the case as submitted to the jury and concludes that appellant merely negligently failed to report his proper income and negligently failed to pay his proper income tax.

This Court has repeatedly held that in reviewing the record at this time it must take the view of the evidence which is most favorable to the Government and accept as true all the facts which the evidence reasonably tended to show. As stated by this Court in *Suetter v. United States*, 140 F. 2d 103, 107 (CA 9, 1944):

> " 'A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial before the jury, fairly tending to sustain the verdict.' *Abrams v. United States*, 250 U. S. 616, 619; 40 S. Ct., 17, 18, 63 L. Ed. 1173. The evidence must be considered in the light most favorable to appellee. *Holmes v. United States*, 8 Cir., 134 F. 2d 125,

> 130; *Hemphill v. United States,* 9 Cir., 120 F. 2d 115, 117."

In a case such as this, the defense of "negligence" in business affairs is but another way of stating that appellant did not "knowingly and wilfully" commit income tax evasion. As was stated in *Remmer v. United States,* 205 F. 2d 277, 288 which related to fraud in an income tax evasion case:

> "A state of mind can seldom be proven by direct evidence but must be inferred from all the circumstances."

The jury after consideration of all the evidence, including the defense of negligence, resolved all issues against the contentions of appellant.

It appears that the appellant feels that he should be acquitted because he was consistently poor in his bookkeeping, but it appears to the appellee that he was more consistent than truthful.

Appellant had knowledge of his filing a false return and this knowledge and wilfulness was proved by the appellee. There was an abundance of evidence showing a consistent pattern or scheme of underreporting a large amount of taxable income and of the failure on the part of the appellant to include all of his income in his books and records that were submitted to his accountants for the purpose of preparing his tax return. This is sufficient to sustain the

conviction. *Holland v. United States,* supra; *Spies v. United States,* 317 U. S. 492.

The testimony in the case shows without question that a pattern or scheme was followed by appellant in withholding taxable income not only the years covered in the indictment but before and afterwards. By having this pattern and scheme he cannot then say it was an under-statement only because of carelessness but was done knowingly and wilfully.

Appellant puts great stress on circumstantial evidence and that the Trial Judge did not cover this properly, but appellee submits circumstantial evidence is no different from direct evidence. *Holland v. United States,* supra. The Court correctly instructed on circumstantial evidence. (R. 562).

The appellant relies heavily on the fact that his proposed instructions were not given. In reading them they would add nothing to the case but confusion. The Trial Court in this case gave sufficient and adequate instructions in clear and concise wording covering every facet of the law which the appellant now feels the Court neglected to give. The reading of the instructions as a whole will show that all the necessary instructions in an income tax case were given by the Trial Judge. In *Wright v. United States,* 175 F. 2d 384 at 388, the Court held:

> "Fortunately, a trial judge in formulating his charge is entitled to use his own language and is not required to let counsel for either party put words into his mouth. If the charge is accurate and gives to the jury all of the law which it needs in order to reach a verdict that is enough."

See also *Bloch v. United States,* 221 F. 2d 786 at 787.

Appellee's position in reference to this case is generally set forth and affirmed in the following cases:

Costello v. United States, 350 U. S. 359
Spies v. United States, 317 U. S. 492
Epstein v. United States, 246 F. 2d 563
Blackwell v. United States, 244 F. 2d 423
Bloch v. United States, 221 F. 2d 786
Holland v. United States, 348 U. S. 121

CONCLUSION

For the reasons set out herein it is submitted that the judgment of the United States District Court should be affirmed.

Respectfully submitted,

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RINER E. DEGLOW,
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